

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application for Approval for the Acquisition by Titan Networks LLC of Indirect Control of Modus Networks, LLC (U7289C) Pursuant to Public Utilities Code Section 854.

Application 17-11-006

DECISION GRANTING TRANSFER OF CONTROL TO NEXTEGE NETWORKS HOLDINGS LLC**Summary**

This decision grants the unopposed joint application of Modus Networks LLC (U7289C), NextEdge Networks Holdings LLC, and Titan Networks LLC for the approval of transfer of control of Modus Networks LLC to NextEdge Networks Holdings LLC pursuant to Section 854 of the California Public Utilities Code.

1. Background

Modus Networks is a Delaware limited liability company. Its exact legal name is Modus Networks, LLC (Modus). Its principal place of business is San Francisco, California. Modus Networks holds a full facilities-based certificate of public convenience and necessity (CPCN) issued by the Commission and also holds telecommunication operating authority issued by the Oregon Public Utility Commission and the Washington Utilities and Transportation Commission. Modus Networks is engaged in the business of

constructing and operating local and interexchange facilities for use in the provision of telecommunications to wholesale customers and retail end users.

The CPCN held by Modus Networks was originally granted to its affiliate Modus Rex, Inc. by Decision (D.) 15-12-013. By that decision, Modus Rex, Inc. was granted authority to operate as a full facilities-based and resale competitive local carrier (CLC) and nondominant interexchange carrier (NDIEC). That CPCN and certain other assets were transferred to Modus Networks, pursuant to Modus Rex, Inc.'s Advice Letter No. 5, dated April 27, 2017.

2. The Application and Proposed Transaction

Joint Applicants request authority for Titan Networks LLC's (Titan) subsidiary NextEdge Networks Holdings LLC (NextEdge) to acquire 100% of the controlling membership interests in Modus Networks. NextEdge is a Delaware limited liability company. NextEdge's proposed acquisition and ownership of direct control of Modus Networks does not constitute the transaction of intrastate business. Therefore, registration with the California Secretary of State is not required.

Approximately 90% of the issued and outstanding membership interests of Titan are held by Titan Grove Holdings LLC (TG Holdings). Jeffrey D. Tannenbaum is the manager of TG Holdings and owns 100% of the capital interest in the company. The current owner of 100% of Modus Networks' controlling membership interests is Modus HoldCo, Inc. (Modus HoldCo), which in turn is owned by Chad M. Abbott, Erik A. Corkery, and Ryan Crowley. Modus HoldCo owns approximately 27% of the controlling interests in NextEdge. The remaining approximately 3% interest is held by EdgeConneX Wireless, LLC.

On November 1, 2017, Titan and Modus Networks jointly filed

Application (A.) 17-11-006 with the Commission and submitted the April 20, 2017 Contribution and Equity Purchase Agreement with the Application in order to obtain Commission approval for the proposed transfer of control of Modus Networks to NextEdge.¹ On March 9, 2018, Judge Stevens issued a ruling requiring an amendment to the Application to include NextEdge as an applicant, in compliance with Rule 3.6, and requiring more information to be included in the Application. On April 6, 2018, Modus Networks LLC, Titan Networks LLC, and NextEdge Networks Holdings LLC filed a joint Amended Application requesting approval for the proposed transfer of control of Modus Networks LLC to NextEdge Networks Holdings LLC. In the Amended Application, the Joint Applicants provided the sufficient information to satisfy the requirement for more information from the March 9, 2018 ruling. There were no protests filed in this proceeding.

Based on their Application and Amended Application, the Joint Applicants seek Commission authorization for a transfer of ownership and control of Modus Networks pursuant to the Contribution and Purchase Agreement. Upon approval by the Commission, Modus Networks will continue to provide service to their existing customers.²

Regarding the operations of Modus Networks (the CPCN holder), the Application contends that NextEdge is well-qualified managerially, technically, and financially to obtain and exercise control over Modus Networks.³ In addition, after the transaction is consummated Modus Networks will continue to

¹ Application, Exhibit F.

² January 11, 2018 Prehearing Conference (PHC) Transcript at 7.

³ Application at 5.

be operated by the same experienced management.⁴ Thus, the Joint Applicants argue that the transfer of control of Modus Networks to NextEdge will not result in immediate changes to the day-to-day operations of Modus Networks.

A PHC was held on January 11, 2018 to determine the parties, scope and schedule for the proceeding. No party opposed the application.

2.1. Requested Authority

This Application was submitted pursuant to Public Utilities Code Section 854. According to California Public Utilities Code Section 854(a), a company must seek authorization from the Commission before such company can “merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state . . .” The purpose of Section 854(a) and related sections is to enable the Commission to review proposed transactions and to take action in the public interest, as a condition of the merger, acquisition or transfer of control, before any transfer of public utility authority is consummated.⁵ Absent prior Commission approval, Section 854(a) provides the transaction is “void and of no effect.”

In addition, the Commission has established that an applicant seeking approval to take control of a holder of a CPCN must, itself, meet the requirements for a CPCN under Public Utilities Code Section 1001. That is, as confirmed in D.15-07-015:

Where a company that does not possess a CPCN desires to acquire control of a company or companies that do possess a CPCN, the Commission will apply the same requirements to

⁴ Application at 5.

⁵ See San Jose Water Co. (1916) 10 CRC 56.

the acquiring company as would be applied to an initial applicant seeking a CPCN.⁶

Accordingly, in this Application, NextEdge must demonstrate that it independently meets the requirements for obtaining a CPCN under Public Utilities Code Section 1001, as if it were a CPCN applicant.

2.2. Compliance with Rule 3.6

The California Public Utilities Commission's Rules of Practice and Procedure Rule 3.6 sets forth requirements for approving an application to acquire or control a utility. As further discussed below, this Application complies with those requirements.

The Joint Applicants provided the most recent financial statements for Modus LLC and Modus Networks LLC.⁷ Joint Applicants have attached as part of Exhibit C, a guarantee by Titan's indirect subsidiary, Modus LLC, assuring that Modus Networks will have access to a minimum of \$ 100,000 in cash resources to meet the Commission's requirements for the period while this joint application is pending and for the first full year following approval of the proposed transaction.

Joint Applicants, further, in the Amended Application supplied evidence that establishes that NextEdge, in its own right, has access to cash resources in the amount of \$100,000 in uncommitted cash or cash-like resources.⁸

The financial information submitted demonstrates that Modus Networks and NextEdge meet the Commission's financial requirements for a CPCN.

⁶ D.15-07-015 at 6-7.

⁷ Exhibits C and G.

⁸ Amended Application at 9.

In addition, (as noted above), the Joint Applicants submitted a copy of the Contribution and Equity Purchase Agreement with their Application. The full terms and conditions of the proposed transfer of control, including the purchase price, are contained in the Contribution and Equity Purchase Agreement submitted with the Application as Exhibit F.

Pursuant to Rule 3.6, the Contribution and Equity Purchase Agreement was duly executed by the Joint Applicants, who are parties to the proposed transfer of control of Modus Networks, and the Contribution and Equity Purchase Agreement contains all information required to be provided under Rule 3.6. More specifically, the Contribution and Equity Purchase Agreement describes the nature of the transaction, and other relevant terms, and provides that subsequent to obtaining all applicable regulatory approvals, NextEdge will take control of Modus Networks. Accordingly, we conclude that this Application complies with the requirements of Rule 3.6.

3. Discussion

3.1. Standard of Review under Section 854(a)

Public Utilities Code Section 854 is applicable to this transaction, and Section 854, subsection (a) is the applicable subdivision. Subdivisions (b) and (c) of Section 854 do not apply, as both subdivisions are applicable only to transactions where a utility (that is a party to the transaction) has a gross annual California revenue exceeding \$500 million. Neither NextEdge nor Modus Networks has gross annual California revenues exceeding \$500 million.

The standard generally applied by the Commission to determine if a transaction should be approved under Public Utilities Code Section 854(a) is whether the transaction will be “adverse to the public interest.”⁹

In addition, the Commission has applied two major criteria for determining whether a CPCN should be granted or transferred under Public Utilities Code Section 1001. An applicant who desires to provide facilities-based interexchange services must demonstrate that it has a minimum of \$100,000 in cash or cash equivalent for operations of the company plus the costs of deposits to be paid to other carriers.¹⁰ An applicant is also required to make a reasonable showing of managerial and technical expertise in telecommunications or a related business.¹¹

⁹ See, for example, *Quest Communications Corp.*, D.00-06-079, 2000 Cal. PUC LEXIS 645, *18. This is also the standard applied by D.03-06-069 (2002 CalPUC LEXIS 975), in which the Commission authorized the transfer of control to EnCana, and by D.05-12-007 (2005 CalPUC LEXIS 527), which authorized the transfer of a 50 percent interest in the parent of Lodi Gas Storage, L.L.C.

¹⁰ The financial requirement for Competitive Local Exchange Carriers is contained in D.95-12-056, Appendix C. The financial requirement for NDIECs is contained in D.91-10-041.

¹¹ D.95-12-056 at Appendix C, Rule 4.A.

3.2. The Proposed Transaction is Not Adverse to the Public Interest

The proposed transaction will result in a transfer of control of Modus Networks to NextEdge. The change in ultimate control of Modus Networks does not involve any assignment of operating authority, assets, or customers. Modus Networks will continue to manage the day-to-day operations and business after the transfer of control. Further, the Application contends that the proposed transaction is viewed by the parties as a means to join together to enhance each of their positions in the marketplace. The proposed transaction will provide Modus Networks with greater access to financial resources and result in synergies leading to increased operating efficiencies and cost savings, all of which should ultimately inure to the benefit of customers in the form of higher service quality, technological advance, and lower prices.¹²

Simultaneously, this should benefit the California telecommunications marketplace consistent with the Commission's interest in fostering competition and diversity of services. The transaction will not result in the discontinuance, reduction, or impairment of any service to any customer in California, and the Joint Applicants will continue to comply with the terms and conditions of the two CPCNs. Following consummation of the proposed transaction, Modus Networks will continue the current operations. The only change apparent to the customer should be that NextEdge will be the owner of Modus Networks. Accordingly, the proposed transfer of control will serve the public interest and not be adverse to the public interest. Accordingly, the proposed transfer of

¹² Application at 7.

control should be authorized by the Commission under Public Utilities Code Section 854.

3.3. NextEdge Networks Meets the Requirements for a CPCN

NextEdge has provided financial documentation demonstrating that it, in conjunction with its parent companies Titan and Modus HoldCo Inc., and Modus Networks have sufficient funds to meet the Commission's minimum financial requirements for a CPCN. The availability of sufficient funds will be subject to verification and review by the Commission for one year.

This Decision also finds that NextEdge and Modus Networks possess the level of technical expertise necessary to qualify for a CPCN in California. In addition, the management team for Modus Networks will continue the operations following the transfer of control. This record demonstrates that NextEdge has the technical and managerial qualifications to acquire and continue to operate Modus Networks' existing telecommunications operations in California and comply with CPCN requirements.

Pursuant to D.13-05-035, Ordering Paragraph 14, applicants for CPCN authority must disclose any regulatory fines, penalties, or sanctions they have received and any past bankruptcies as part of establishing the qualifications of management staff. The Joint Applicants have affirmed under penalty of perjury, to the best of their knowledge, and except as provided in Exhibit B of the Application, that no Applicant, and none of their affiliates, officers, directors, partners, agents, or owners (directly or indirectly) of more than ten percent of Applicant, or anyone acting in a management capacity for an Applicant: (a) held one of these positions with a company that filed for bankruptcy; (b) been personally found liable, or held one of these positions with a company that has been found liable for fraud, dishonesty, failure to disclose, or misrepresentations

to consumers or others; (c) been convicted of a felony; (d) been the subject of a criminal referral by judge or public agency; (e) had a telecommunications license or operating authority denied, suspended, revoked, or limited in any jurisdiction; (f) personally entered into a settlement, or held one of these positions with a company that has entered into settlement of criminal or civil claims involving violations of sections 17000 *et seq.*, 17200 *et seq.*, or 17500 *et seq.* of the California Business & Professions Code, or of any other statute, regulation, or decisional law relating to fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; (g) been found to have violated any statute, law, or rule pertaining to public utilities or other regulated industries; or (h) entered into any settlement agreements or made any voluntary payments or agreed to any other type of monetary forfeitures in resolution of any action by any regulatory body, agency, or attorney general.

The Joint Applicants have affirmed under penalty of perjury, except as set forth in Exhibit B of the Application, to the best of Joint Applicants' knowledge, that neither Applicant, any affiliate, officer, director, partner, nor owner of more than ten percent of Joint Applicants, nor any person acting in such capacity whether or not formally appointed, is being or has been investigated by the Federal Communications Commission (FCC) or any law enforcement or regulatory agency for failure to comply with any law, rule or order.

As contained in the exceptions included in Exhibit B, on June 14, 2017, Titan acquired Modus, Inc. a/k/a Modus Rex, Inc., which, immediately prior to that acquisition, was an affiliate of Modus Networks, LLC. At the time of the acquisition, Modus, Inc. held a registration to operate as a telecommunications company issued by the Washington Utilities and Transportation Commission (WUTC) on October 15, 2015, in Docket UT-151839. Modus never commenced

operations in Washington and inadvertently overlooked its obligation to file an annual report with the WUTC for calendar year 2015. Modus submitted a late-filed report and paid a fine ordered by the WUTC in Docket UT-160571. Modus repeated its error by failing to timely file its 2016 annual report, which was due on May 1, 2017. This led to Modus' inclusion, along with other companies, as a respondent in WUTC Docket UT-17098. Modus subsequently cured the violation and paid a fine, as ordered by the WUTC. Titan notes that Chad Abbot, Eric Corkery, and Ryan Crowley, who own and manage Modus Networks, LLC, one of the Joint Applicants, also owned and managed Modus at the times of these violations and that each of them will continue to hold managerial or similar positions following approval of Titan's acquisition of Modus Networks, LLC. We find that these violations, while concerning, are not significant enough to warrant the Commission's denial of the CPCN transfer.

Accordingly, we find that the Joint Applicants satisfied the requirements of D.13-05-035, and demonstrated sufficient financial strength, managerial and technical expertise to satisfy Commission requirements for a CPCN.

In addition, we find that the transaction is in the public interest as it is not adverse to the public interest. The proposed transaction fulfills the requirements of Public Utilities Code Section 854, and the proposed transfer of control of Modus Networks to NextEdge is in the public interest. Therefore, it is reasonable for the Commission to approve the transaction.

4. California Environmental Quality Act Compliance (CEQA)

Pursuant to the CEQA¹³ and Rule 2.4, the Commission is required to consider the environmental impacts and consequences of projects that are subject to Commission approval.

While, in some cases, a change of ownership and/or control may alter approved projects, result in new projects, or change facility operations in ways that may have an environmental impact, the Joint Applicants state that the proposed transaction is entirely a “paper transaction” and no authority for construction is requested. In addition, the Joint Applicants indicate that the proposed transaction does not have the possibility to result in a significant effect in the environment pursuant to CEQA.

Under these circumstances, we conclude with certainty that granting this Application will not have a significant adverse impact upon the environment. The proposed transaction qualifies for an exemption from CEQA pursuant to § 15061(b)(3) of the CEQA guidelines,¹⁴ and the Commission does not need to perform any further environmental review before approving this proposed transfer of control to Modus Networks to NextEdge. In the future, before NextEdge and/or Modus Networks could embark on new projects or construct facilities under the CPCN (other than installing equipment in existing buildings or structures) each or both must file for additional authority and submit to any necessary CEQA review.

¹³ Public Resources Code § 21000 *et seq.*

¹⁴ Title 14, California Code of Regulations, § 15000 *et seq.*

5. Safety Considerations

With the adoption of the *Safety Policy Statement of the California Public Utilities Commission* on July 10, 2014, the Commission has, among other things, considered the potential safety implications of this proceeding. This Decision finds that Modus Networks and NextEdge will meet the Commission's minimum safety goals and expectations of CLECs because: (1) Modus Networks and NextEdge have taken steps to meet the financial requirements as set forth in this decision for a facilities-based CLEC, and (2) Modus Networks will remain public utilities that are required, pursuant to Public Utilities Code Section 451, to "... furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities ... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

6. Outstanding Procedural Matters

Concurrently with the Application, applicants have filed a motion to file under seal to protect from public disclosure financial and contractual information contained in Exhibits C, G, and F. Good cause having been shown, the motion is granted.

The Commission affirms all rulings made by the assigned Commissioner and assigned Administrative Law Judge (ALJ). All motions not previously ruled on are denied as moot.

7. Conclusion

This Application should be approved. This approval should not modify the terms and conditions associated with the CPCN granted to Modus Networks in any way. Modus Networks should continue to be bound by the terms and conditions imposed on it as part of the CPCN granted in D.15-12-013.

8. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Brian Stevens is the assigned ALJ in this proceeding.

9. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2), the otherwise applicable 30-day period for public review and comment is waived.

Findings of Fact

1. Modus Networks LLC is a Delaware limited liability company with its principal place of business in San Francisco, CA and is engaged in the business of constructing and operating local and interexchange facilities for use in the provision of telecommunications to wholesale customers and retail end users.

2. The Commission granted Modus Networks LLC a Certificate of Public Convenience and Necessity to provide facilities-based and resale telecommunications services within California in D.15-12-013.

3. NextEdge Networks Holdings LLC is a Delaware limited liability company.

4. NextEdge Networks Holdings LLC 's proposed acquisition and ownership of direct control of Modus Networks does not constitute the transaction of intrastate business and thus registration with the California Secretary of State is not required.

5. On April 20, 2017, joint parties including Modus Networks LLC and NextEdge Networks Holdings LLC entered into a Contribution and Equity Purchase Agreement for the proposed transfer of control of Modus Networks LLC to NextEdge Networks Holdings LLC.

6. Upon completion of the transaction, Modus Networks LLC will become a wholly owned, direct subsidiary of NextEdge Networks Holdings LLC.

7. On November 09, 2017, Modus Networks LLC and Titan Networks LLC filed A.17-11-006 requesting approval for the proposed transfer of control of Modus Networks LLC to NextEdge Networks Holdings LLC.

8. On April 06, 2018, Modus Networks LLC, Titan Networks LLC, and NextEdge Networks Holdings LLC filed a joint amended application requesting approval for the proposed transfer of control of Modus Networks LLC to NextEdge Networks Holdings LLC.

9. The financial information submitted in the Application and Amended Application demonstrates that Modus Networks LLC and NextEdge Networks Holdings LLC meet the Commission's financial requirements for a Certificate of Public Convenience and Necessity.

10. The full terms and conditions of the proposed transfer of control, including the purchase price, are contained within the Application.

11. The Contribution and Equity Purchase Agreement was duly executed by the joint applicants.

12. The Contribution and Equity Purchase Agreement contains all information required to be provided under Rule 3.6.

13. Neither Modus Networks LLC nor NextEdge Networks Holdings LLC is a utility that has a gross annual California revenue exceeding \$500 million.

14. As a result of the transaction, Modus Networks LLC should have access to additional capital and managerial experience, which should enhance Modus Networks LLC's operations.

15. The proposed transaction should benefit the California telecommunications marketplace.

16. Following the proposed transaction, Modus Networks LLC will continue its current operations.

17. The proposed transaction will not have an adverse effect on the public interest.

18. NextEdge Networks Holdings LLC has provided financial documentation demonstrating that it and Modus Networks LLC have sufficient funds to meet the Commission's minimum financial requirements for a Certificate of Public Convenience and Necessity.

19. NextEdge Networks Holdings LLC possesses the level of technical expertise necessary to qualify for a Certificate of Public Convenience and Necessity in California.

20. The management team for Modus Networks LLC will continue its operations following the transfer of control.

21. Except as provided in Exhibit B, no one associated with or employed by Modus Networks LLC nor NextEdge Networks Holdings as an affiliate, officer, director, partner, agent, or owner of more than ten percent of them, except as noted by the Application: (a) held one of these positions with a company that filed for bankruptcy; (b) been personally found liable, or held one of these positions with a company that has been found liable, for fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; (c) been convicted of a felony; (d) been the subject of a criminal referral by judge or public agency; (e) had a telecommunications license or operating authority denied, suspended, revoked, or limited in any jurisdiction; (f) personally entered into a settlement, or held one of these positions with a company that has entered into settlement of criminal or civil claims involving violations of sections 17000 *et seq.*, 17200 *et seq.*, or 17500 *et seq.* of the California Business & Professions Code, or of

any other statute, regulation, or decisional law relating to fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; (g) been found to have violated any statute, law, or rule pertaining to public utilities or other regulated industries; (h) entered into any settlement agreements or made any voluntary payments or agreed to any other type of monetary forfeitures in resolution of any action by any regulatory body, agency, or attorney general; or (i) is being, or has been investigated by the FCC or any law enforcement or regulatory agency for failure to comply with any law, rule or order.

22. The Joint Applicants satisfy the requirements of D.13-05-035, and demonstrate sufficient financial strength, and managerial and technical expertise to satisfy Commission requirements for a CPCN.

23. Granting this application will not have a significant adverse impact upon the environment.

24. The proposed transaction qualifies for an exemption from the CEQA.

25. The Commission does not need to perform any further environmental review before approving this proposed transfer of control of Modus Networks LLC to NextEdge Networks Holdings LLC.

26. Modus Networks LLC and NextEdge Networks Holdings LLC meet the Commission's minimum safety goals and expectations of Competitive Local Exchange Carriers.

Conclusions of Law

1. The Application complies with Commission Rule 3.6.
2. The proposed transaction constitutes a change of control, within the meaning of Public Utilities Code Section 854.
3. Public Utilities Code Section 854, subsections (b) and (c) do not apply to this transaction.

4. Public Utilities Code Section 854(a) provides that no person or corporation shall merge, acquire, or directly or indirectly control a public utility organized and doing business in California without first securing authorization from the Commission.

5. The standard generally applied by the Commission to determine if a transaction should be approved under Section 854(a) is whether the transaction will be “adverse to the public interest.”

6. The proposed transaction is not adverse to the public interest.

7. The Application should be granted under Public Utilities Code Section 854(a).

8. This transfer of control qualifies for an exemption from the CEQA under California Environmental Quality Act guidelines § 15061(b)(3) and therefore, additional environmental review is not required.

9. Joint Applicants demonstrate sufficient financial strength, and managerial and technical expertise to satisfy Commission requirements for a CPCN.

10. Modus Networks LLC should continue to be bound by the terms and conditions of a CPCN granted in D.15-12-013.

11. The motion to file under seal to protect from public disclosure the financial and contractual information contained in Exhibits C, G, and F should be granted for three years.

12. Evidentiary hearings are not necessary. The preliminary determinations in Resolution ALJ 176-3409 should not be disturbed.

13. A.17-11-006 should be closed.

O R D E R

IT IS ORDERED that:

1. The Amended Application of Modus Networks LLC, Titan Networks LLC, and NextEdge Networks Holdings LLC for the approval of the transfer of control of Modus Networks LLC to NextEdge Networks Holdings LLC is approved pursuant to Section 854 of the California Public Utilities Code.

2. Modus Networks LLC shall continue to be bound by the terms and conditions imposed on it as part of the Certificates of Public Convenience and Necessity, as granted by Decision 15-12-013.

3. The authority granted by this decision shall expire if not exercised within 12 months from the effective date of this decision.

4. The motion to file under seal to protect from public disclosure the financial and contractual information contained in Exhibits C, G, and F is granted for a period of three years after the date of this decision. During this three-year period, this information shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If Modus Networks LLC believes that it is necessary for this information to remain under seal for longer than three years, Modus Networks LLC may file a new motion showing good cause for extending this order by no later than 30 days before the expiration of this order.

5. Application 17-11-006 is closed.

This order is effective today.

Dated _____, at Sacramento, California.